91-1363

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GARY JOHNSON, STATE'S ATTORNEY OF KANE COUNTY; JOHN RANDALL, SHERIFF OF KANE COUNTY; ROLAND W. BURRIS, ATTORNEY GENERAL OF THE STATE OF ILLINOIS,

Petitioners,

vs.

CHI FENG SU,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a habeas petitioner and the court below received fair notice of the entity seeking to appeal the granting of the writ when counsel for the State filed a notice of appeal with a caption which specifically designated one of the three individual respondents who were sued in their official capacities, but included an "et al." designation of the others, and the body of the notice stated that "respondents" appeal from an order granting the writ?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GARY JOHNSON, STATE'S ATTORNEY OF KANE COUNTY; JOHN RANDALL, SHERIFF OF KANE COUNTY; ROLAND W. BURRIS, ATTORNEY GENERAL OF THE STATE OF ILLINOIS,

Petitioners,

vs.

CHI FENG SU,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioners, Gary Johnson, John Randall, and Roland W. Burris, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on September 20, 1991.

OPINION BELOW

The order of the United States Court of Appeals for the Seventh Circuit is not reported. It is reproduced in the appendix hereto, p. 1a, *infra*. The opinion of the

United States District Court for the Northern District of Illinois, Eastern Division, is reported at 737 F.Supp. 488 (N.D. Ill. 1990).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on September 20, 1991, dismissing the appeal for lack of jurisdiction. No petition for rehearing was filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The petition for writ of certiorari is timely filed pursuant to 28 U.S.C. § 2102(c).

STATUTE INVOLVED

Federal Rule of Appellate Procedure 3(c)

Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

STATEMENT OF THE CASE

In Kane County, Illinois, respondent, Dr. Chi Feng Su, [hereinafter "Su"], was charged in a single indictment with fifty-five counts of unlawful delivery of a controlled substance. After Su's attorney indicated that he planned to file a motion for severance (R. 40), the State filed an election indicating that it would try Su only on Counts 41-55, but use evidence of the remaining counts as relevant to motive, intent, method of operation and common scheme. (C. 58) It appears from the record that Su, through his attorney, agreed to the use of the evidence of Counts 1-40 in this manner. (R. 118-19)

After a bench trial, Su was found not guilty of the fifteen counts on which he was tried. (R. 1451) The trial judge, the Honorable John Nickels, stated that he was not convinced beyond a reasonable doubt that Su knowingly and unlawfully issued the prescriptions described in those counts outside the regular course of professional treatment. (R. 1450-51)

Approximately one week later, the State filed a motion for substitution of judges for trial on the remaining forty counts. (C. 63) On the same date, Su filed a motion to dismiss the remaining forty counts on the basis of collateral estoppel and double jeopardy. Both the State's motion to substitute judges and the respondent's motion to dismiss the remaining charges were denied. (C. 70; 126) The State later filed a motion for recusal before Judge Nickels which was also denied. (C. 82)

Su appealed the denial of his motion to dismiss to the Illinois Appellate Court, Second District, which affirmed on March 30, 1989. Su then filed a petition for leave to

appeal to the Illinois Supreme Court which was denied on October 5, 1989.

On June 5, 1989, Su filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Illinois, Eastern Division, naming as respondents the State's Attorney of Kane County, the Sheriff of Kane County, and the Illinois Attorney General.[1] On May 10, 1990, the Honorable James H. Alesia, determining that "[t]he State could not have a 'completely blank slate' for a second trial," granted the writ. *U.S. ex rel. Su v. Casey*, 737 F.Supp. 488, 493 (N.D. Ill. 1990). In an order entered the same day, Judge Alesia ordered that the Sheriff of Kane County shall be permanently enjoined from restricting Su's freedom, and the State's Attorney of Kane County and the Illinois Attorney General shall be permanently enjoined from prosecuting Su on any charges brought against him as part of the case, *People v. Su*, Case No. 86 CF 981 in Kane County, Illinois. Said order is reproduced in the appendix hereto, p. 5a, *infra*.

On June 7, 1990,[2] the State filed a notice of appeal which is reproduced in the appendix hereto, p. 7a, *infra*. The caption of the notice of appeal specifically named Robert F. Casey as an appellant, but included an "et al." designation of the other two. The body of the notice

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[1] Although the petition named Robert F. Casey as the State's Attorney of Kane County, Gary Johnson succeeded Casey as State's Attorney in December of 1988. The petition also named Neil F. Hartigan as Illinois Attorney General. Hartigan was later succeeded by Roland W. Burris in January of 1990. John Randall, who was named in the petition as the Sheriff of Kane County, still holds that office.

[2] Pursuant to Federal Rule of Appellate Procedure 26(a), the State's notice of appeal was not required to be filed until June 11, 1990.

stated that "respondents" appeal from an order granting the writ. The clerk of the District Court accepted the notice of appeal.

On June 14, 1990, the United States Court of Appeals for the Seventh Circuit notified counsel for the State that its notice of appeal may be deficient under Federal Rule of Appellate Procedure 3(c) for failing to specifically name the parties taking the appeal in the body of the notice. The court's order, which is reproduced in the appendix hereto, p. 9a, *infra*, ordered the State to file a jurisdictional memorandum stating why the appeal should not be dismissed for lack of jurisdiction. Counsel for the State complied and Su's attorney responded.

On June 28, 1990, pursuant to Federal Rule of Appellate Procedure 4(a)(5), counsel for the State filed a Motion to Extend Time for Filing Notice of Appeal, seeking additional time in which to file another notice of appeal. The motion explained to the District Court how the Court of Appeals had notified counsel for the State that its notice of appeal may be deficient. It also stated that the Seventh Circuit's construction of Fed.R.App.P. 3(c) would probably result in a dismissal of the entire appeal. The District Court nonetheless denied the State's motion.

On December 18, 1990, the Court of Appeals ordered the parties to proceed with briefing on the merits and to address the issue of appellate jurisdiction again in their briefs.[3] Said order is reproduced in the appendix hereto, p. 11a, *infra*.

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[3] In the Court of Appeals, the State also argued that since a recent decision of that court, decided in July of 1990, it appeared that of the three respondents Su named in his petition, none was

(Footnote continued on following page)

Approximately two weeks after hearing oral arguments, the Court of Appeals dismissed the State's appeal for lack of jurisdiction pursuant to Fed.R.App.P. 3(c).

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW, RAISING AN ISSUE UPON WHICH THE CIRCUITS ARE IN CONFLICT, UNNECESSARILY DENIED THE STATE ITS RIGHT TO APPEAL THE GRANTING OF A WRIT OF HABEAS CORPUS, THEREBY OFFENDING PRINCIPLES OF FEDERALISM AND COMITY.

The court below dismissed the State's entire appeal because none of the respondents were individually named in the body of the notice of appeal, even though the caption expressly named Robert F. Casey, the former State's Attorney of Kane County who Su named in his habeas petition, as an appellant. The ruling is in conflict with the decisions of the United States courts of appeals for other

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[3] *continued*
technically his custodian possessing the power to comply with the writ. *See Cruz v. Warden*, 907 F.2d 665 n.1 (7th Cir. 1990) (holding that the state attorney general is not a proper respondent when a petitioner is out on bail which, for purposes of Rule 2, 28 U.S.C.A. foll. § 2254, constitutes present custody). Before *Cruz*, it appeared that a person out on bail could name the state attorney general as a respondent. *See* Rule 2, 28 U.S.C.A. foll. § 2254 advisory committee's notes. Citing *Mullaney v. Anderson*, 342 U.S. 415, 415-17 (1952) and Federal Rule of Civil Procedure 21, the State argued that if in fact no proper respondent was named, the Court of Appeals need simply add Su's true custodian—presumably the Circuit Court of the 16th Judicial Circuit which admitted him to bail—if it decided the granting of the writ was in fact warranted. The Court of Appeals failed to address this question.

circuits that have considered the question of whether jurisdiction exists as to a party specifically named in the caption, but generically referred to in the body of a notice of appeal.[4] The ruling also fails to honor this Court's settled rule that "the requirements of the rules of procedure should be liberally construed and that 'mere technicalities' should not stand in the way of consideration of a case on the merits." *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316, 108 S.Ct. 2405, 2408 (1988), citing *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227 (1962).

Petitioners note that *Torres*, the case upon which the court below relied, involved a situation in which, because of a clerical error in the notice of appeal, one putative appellant was not specified as a party to the appeal in any way. He was not specified by name in either the caption or the body of the notice. Nor was he specified by reference or implication. In fact, of the 16 intervening plaintiffs, he was the only one not specified by name as an appellant in the body of the notice. Accordingly, this Court found that he had not filed the "functional equivalent of a notice of appeal." 487 U.S. at 317. Here, at the very least, the court below had jurisdiction over the appeal of the State's Attorney of Kane County, who was sued in his official capacity and whose predecessor was

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[4] *See Biros v. Spaulding-Evenflo Co., Inc.*, 934 F.2d 740, 742 (6th Cir. 1991); *Mariani-Giron v. Acevedo-Ruiz*, 877 F.2d 1114, 1116 (1st Cir. 1989); *National Center for Immigrants' Rights, Inc. v. Immigration & Naturalization Service*, 892 F.2d 814, 816 n.2 (9th Cir. 1989); *Laidley v. McClain*, 914 F.2d 1386, 1388-89 (10th Cir. 1990); *Minority Employees v. Tenn. Dept. of Emp. Sec.*, 901 F.2d 1327, 1335 (6th Cir. 1990) (en banc), *cert. denied, Davis v. Tenn. Dept. of Emp. Sec.*, 111 S.Ct. 210 (1990). In *Masquerade Novelty v. Unique Industries*, 912 F.2d 663, 666 n.1 (3rd Cir. 1990), the Third Circuit, after expressly noting a conflict in the circuits regarding the question, declined to resolve the issue.

specifically named in the caption of the notice of appeal.[5] *See Graddick v. Newman*, 453 U.S. 928, 940-41, 102 S.Ct. 4 (1981) (Rehnquist, J.; mem.) (state attorney general lost nothing by his failure to request a formal substitution of parties following his replacement).

It is in fact the petitioners' position that they each filed the "functional equivalent of a notice of appeal." All were named as appellants by implication. Specifically, they were all named as appellants by reference to their position as "respondents" in the body of the notice of appeal. The caption of the habeas petition filed by Su in the District Court designated as respondents the State's Attorney of Kane County, the Sheriff of Kane County, and the Illinois Attorney General. Although succeeding individual officeholders were automatically substituted for their predecessors, (*see* Fed.R.Civ.P. 25(d); Fed.R.App.P. 43(c)), no respondents were dismissed nor added at any stage of the proceedings. The caption also included a case number—No. 89 C 4516. The case number was used in all subsequent filings, including the notice of appeal. When petitioners herein referred to themselves in the body of the notice of appeal as "respondents," they could only have been referring to the respondents in Case No. 89 C 4516. Unlike in *Torres*, there was no list of appellants from which one name was omitted. The Assistant Attorney General who filed the notice of appeal intended the notice

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[5] Jurisdiction over an appeal filed only by the State's Attorney of Kane County, who was sued in his capacity as a state official, would have been sufficient for purposes of allowing the Court of Appeals to review the granting of the writ. *See Kentucky v. Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099 (1985) ("As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.")

to specify as the parties taking the appeal the "respondents" in Case No. 89 C 4516 and those are precisely the parties the notice did specify as appellants.

Furthermore, specifically in a Section 2254 case which is an official-capacity action, it is clear who would be seeking to appeal the granting of the writ. Su's attorney and the court below clearly understood that an appeal by Robert F. Casey, who Su named in his official capacity as the State's Attorney of Kane County, was in effect an appeal by the State of Illinois. Indeed, this Court has repeatedly recognized that the real party in interest in an official-capacity suit is the entity represented and not the individual officeholder. *Karcher v. May*, 484 U.S. 72, 78, 108 S.Ct. 388 (1987). This Court also routinely refers to the responding party or parties in Section 2254 cases as "the State." *See e.g., Granberry v. Greer*, 481 U.S. 129, 134, 107 S.Ct. 1671 (1987) (providing that "[w]hen the State answers a habeas corpus petition, it has a duty to advise the district court whether the prisoner has, in fact, exhausted all available state remedies.").

Application of these principles compels the conclusion that many litigants, not only in habeas cases but in a vast variety of cases, are being denied their right to appeal on the basis of "mere technicalities." Even after *Torres*, "it is evident that the bench and bar continue to be plagued by confusion in the interpretation of the language of Fed.R.App.P. 3(c)." *Minority Employees v. Tenn. Dept. of Emp. Sec.*, 901 F.2d at 1335 n.4.[6] "Unless and until

[6] *See National Center for Immigrants' Rights, Inc. v. Immigration & Naturalization Service*, 892 F.2d 814, 815-17 (9th Cir. 1989) (holding that individual names of appealing parties need not be listed in body of notice in instances in which generic term, such

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[6] *continued*

as "plaintiffs" or "defendants," adequately identified them); *Association of American Medical Colleges v. Cuomo*, 913 F.2d 55, 56 (2nd Cir. 1990), *cert. denied*, 112 S.Ct. 184 (1991) (holding that the phrase "the defendants in the above matter hereby appeal" was the functional equivalent of naming each and every defendant); *United States v. Schneider*, 926 F.2d 777, 778-79 (8th Cir. 1991) (holding that an "et al." designation in a notice of appeal is ineffectual to bring before the court any defendant other than the named appellant); *Worlds v. Dept. of Health & Rehab. Service*, 929 F.2d 591, 593 (11th Cir. 1991) (holding that the use of the term "et al.," was not sufficient to indicate that all putative appellants were appealing); *Morales v. Pan American Life Ins. Co.*, 914 F.2d 84, 85 (5th Cir. 1990) (The Fifth Circuit recognizes four situations where the "et al." designation will satisfy the Rule 3(c) specificity requirement); *Battle v. Anderson*, 1991 U.S. App. Lexis 26084 (appendix, p. 13a, *infra*) (Tenth Circuit recognizes official capacity suits as an exception to the general rule in *Torres*). A panel of the Sixth Circuit Court of Appeals held in *Ford v. Nicks*, 866 F.2d 865, 869-70 (6th Cir. 1989), that although the caption of the notice of appeal specifically named only one defendant and referred to the others as "et al.," the specificity requirement was met where the body stated that the appeal was being taken by "the defendants," indicating that all the defendants were appealing, not just some of them. The following year, on rehearing en banc, the court held in *Minority Employees v. Tenn. Dept. of Emp. Sec.*, 901 F.2d at 1332, that the use of "et al." to designate certain appellants in the caption of a notice of appeal precludes conferment of jurisdiction over the appeal of those plaintiffs even though designated generically as "plaintiffs" in the body. However, Judge Nelson, joined by Judges Jones, Norris, and Chief Judge Merritt, filed a separate opinion, concurring in part and dissenting in part, which stated that the notice of appeal filed in the case was "completely faithful to the plain commands of Rule 3(c)." 901 F.2d at 1341. Judge Martin, joined by Judge Jones, filed a dissenting opinion also disagreeing with the reasoning of the majority. Finally, Judge Guy filed a concurring opinion, stating that although he believed the dissent set forth a more reasonable approach to the interpretation of Fed.R.App.P. 3(c), he joined the conclusion reached by the majority for the compelling reason that if he instead dissented, it would result in an equally divided court and no opinion would issue from the en banc court. 901 F.2d at 1340. Disagreement also exists among the judges of the First Circuit. *See Marin-Piazza v. Aponte-Rogue*, 873 F.2d 432 (1st Cir. 1989), where Judge Coffin,

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Congress or [this Court] decrees otherwise," United States courts of appeals will continue to deny litigants their right to appeal. *Appeal of District of Columbia Nurses' Ass'n*, 854 F.2d 1448, 1451 (D.C. Cir. 1988) (Mikva, J., concurring), *cert. denied*, 491 U.S. 906 (1989). This will be true even though such litigants afford their opponents and the courts of appeals fair notice of their intent to appeal.

This Court has recognized that reexamination of state convictions on federal habeas offends federalism and comity. *McClesky v. Zant*, 111 S.Ct. 1454, 1469, 113 L.Ed.2d 517 (1991). The offense compounds when, as in the instant case, the State is denied its right to appeal the granting of the writ on the basis of "mere technicalities." The decision below affords this Court the opportunity both to correct error which has frustrated a State's sovereign power to punish offenders of its criminal laws, and to resolve a conflict among the circuits on an issue having widespread implications in the area of federal appellate procedure.

[6] *continued*

who wrote the court's opinion, noted that he disagreed with his brethren on the question of whether a notice of appeal stating that "the codefendants in this action hereby appeal" was effective as to all codefendants. "This refers to a precise group of five persons," Judge Coffin said. "In my view," he continued, "this is sufficient to meet the holding in *Torres*. . . ." 873 F.2d at 433 n.1.

CONCLUSION

For all the reasons discussed herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT—WITH ORAL ARGUMENT

Date: September 20, 1991

BEFORE: Honorable Walter J. Cummings, Circuit Judge
Honorable Harlington Wood, Jr., Circuit Judge
Honorable Michael S. Kanne, Circuit Judge

No. 90-2275

CHI FENG SU,

Petitioner-Appellee

v.

ROBERT F. CASEY, JOHN RANDALL
and NEIL F. HARTIGAN,

Respondents-Appellants

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 89 C 4516, Judge James H. Alesia

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that this appeal is hereby, DISMISSED for lack of jurisdiction, in accordance with the order of this Court entered this date.

[UNPUBLISHED ORDER NOT TO BE CITED
PER CIRCUIT RULE 53]

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued September 4, 1991

September 20, 1991

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

CHI FENG SU,

Petitioner-Appellee,

No. 90-2275 *v.*

ROBERT F. CASEY, JOHN RANDALL
and NEIL F. HARTIGAN,

Respondents-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 89 C 4516—**James H. Alesia,** *Judge.*

ORDER

Petitioner Chi Feng Su ("Su") successfully sought a writ of habeas corpus from the district court. Su had been indicted in the Circuit Court of Kane County, Illinois. The

55 counts of the indictment charged delivery of a controlled substance to one of four undercover police officers. The State elected to prosecute Su on Counts 41 through 55 of the indictment but introduced evidence as to all counts to establish Su's "motive, intent, method of operation and common scheme." He was acquitted on all fifteen counts in a bench trial. Thereafter the State decided to prosecute him on Counts 1 through 40. He unsuccessfully moved to dismiss those counts on various grounds, including collateral estoppel and the double jeopardy clause of the Fifth Amendment applicable to the states through the Fourteenth Amendment. The Appellate Court of Illinois affirmed, and the Illinois Supreme Court denied his petition for leave to appeal.

Judge Alesia granted Su's subsequent petition for a writ of habeas corpus on the basis of the double jeopardy clause because the State was planning to present the same evidence at the second trial as in the first trial to show Su's intent. See *Ashe v. Swenson*, 397 U.S. 436.

In the district court, the defendants were Robert F. Casey, who is the State's Attorney of Kane County, John Randall, its Sheriff, and then-Illinois Attorney General Hartigan. However, none of the respondents was named in the notice of appeal filed by an Assistant Attorney General of Illinois. Instead, the notice of appeal provided:

> Notice is hereby given that respondents, by their attorney, NEIL F. HARTIGAN, Attorney General of the State of Illinois, hereby appeals [sic] to the United States Court of Appeals for the Seventh Circuit, from an order granting the petitioner's petition for a writ of habeas corpus entered in this action on the 11th day of May, 1990.

It should be noted that the only person named in the body of the notice of appeal was the attorney for the respondents.

Federal Rule of Appellate Procedure 3(c) provides that "[t]he notice of appeal shall specify the party or parties taking the appeal." The Supreme Court has recognized the jurisdictional import of this rule, holding that "[t]he failure to name a party in a notice of appeal * * * constitutes a failure of that party to appeal." *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314. This Court has consistently followed *Torres* in similar circumstances.* Accordingly, the notice of appeal was defective and the appeal is dismissed for lack of jurisdiction.

* *Pride v. Venango River Corporation*, 916 F.2d 1215 (1990); *Hartford Casualty Ins. Co. v. Borg Warner Corporation*, 913 F.2d 419 (1990); *Bigby v. City of Chicago*, 871 F.2d 54 (1989); *Allen Archery, Inc. v. Precision Shooting Equipment, Inc.*, 857 F.2d 1176 (1988).

[DATED MAY 10, 1990]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel.
CHI FENG SU,

Petitioner,

v.

ROBERT F. CASEY, et al.,

Respondents.

No. 89 C 4516—Judge James H. Alesia

ORDER

This matter coming on the Petition for a Writ of Habeas Corpus by petitioner, Chi Feng Su, and the Court having read the pleadings and memorandum filed by the parties and the Court being fully advised, IT IS ORDERED THAT:

1. The Petition for a Writ of Habeas Corpus is granted;

2. The Sheriff of Kane County shall be permanently enjoined from holding or restricting the freedom of Chi Feng Su, based upon the charges in the case of *People of the State of Illinois v. Chi Feng Su*, Case No. 86 CF 981 in Kane County, Illinois;

3. The State's Attorney of Kane County and the Attorney General of the State of Illinois shall be permanently enjoined from prosecuting Chi Feng Su on any of the

charges brought against him as part of the case of *People of the State of Illinois v. Chi Feng Su*, Case No. 86 CF 981 in Kane County, Illinois.

IT IS SO ORDERED.

/s/ James H. Alesia
United States District Judge

Dated: MAY 10, 1991

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel.
CHI FENG SU,

Petitioner,

v.

ROBERT F. CASEY, et al.,

Respondents.

No. 89 C 4516
The Honorable James H. Alesia, Judge Presiding.

NOTICE OF APPEAL

Notice is hereby given that respondents, by their attorney, NEIL F. HARTIGAN, Attorney General of the State of Illinois, hereby appeals to the United States Court of Appeals for the Seventh Circuit, from an order granting the petitioner's petition for a writ of habeas corpus entered in this action on the 11th day of May, 1990.

Respectfully submitted,
NEIL F. HARTIGAN
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BY: /s/ Arleen C. Anderson
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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 14, 1990.

By the Court:

CHI FENG SU,

Petitioner-Appellee,

No. 90-2275 v.

ROBERT F. CASEY, JOHN RANDALL
and NEIL F. HARTIGAN,

Respondents-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 89-C-4516—Hon. James H. Alesia, *Judge*.

ORDER

A preliminary review of the short record indicates that the Notice of Appeal may be deficient. In *Torres v. Oakland Scavenger Co.*, 108 S. Ct. 2405, 2407 (1988), the Supreme Court held that naming the parties taking an appeal in the notice of appeal is a jurisdictional prerequisite to their participation in the appeal. This court has since held that the appellants taking the appeal must be specified in the body of the notice of appeal. *Bigby v. City of Chicago*, 871 F.2d 54 (7th Cir. 1989). Accordingly,

IT IS ORDERED that respondents-appellants shall file, on or before July 3, 1990, a brief memorandum stating why this appeal should not be dismissed for lack of jurisdiction. A motion for voluntary dismissal pursuant to Fed. R. App. P. 42(b) will satisfy this requirement. Briefing shall be held in abeyance pending further court order.

NOTE: Caption document "*JURISDICTIONAL MEMORANDUM.*" The filing of a Circuit Rule 3(c) Jurisdictional Statement does not satisfy your obligation under this order.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 18, 1990.

By the Court:

CHI FENG SU,

Petitioner-Appellee,

No. 90-2275 v.

ROBERT F. CASEY, JOHN RANDALL
and NEIL F. HARTIGAN,

Respondents-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 89-C-4516—Hon. James H. Alesia, *Judge*.

ORDER

On consideration of the "JURISDICTIONAL MEMORANDUM" filed by counsel for appellants and the "RESPONSE TO RESPONDENTS-APPELLANTS JURISDICTIONAL MEMORANDUM" filed by counsel for appellee,

IT IS ORDERED that the briefing in this appeal shall proceed as follows:

1. The appellants shall file their joint brief and required short appendix on or before January 23, 1991.

2. The appellee shall file his brief on or before February 22, 1991.

3. The appellants shall file their joint reply brief, if any, on or before March 8, 1991.

The parties shall address the issue of appellate jurisdiction in their respective briefs. The clerk of this court is directed to distribute, along with the briefs in this appeal, copies of this order, the orders of June 14, 1990 and July 30, 1990 (corrected on July 31, 1990), and the jurisdictional memoranda of the parties.

NOTE: The parties are advised that Federal Rule of Appellate Procedure 26(c), which allows for three additional days after service by mail, does not apply when the due dates of briefs are set by order of this court. All briefs are due by the dates ordered.

BOBBY BATTLE, et al., Plaintiffs-Appellees, UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. PARK ANDERSON, his successor; RICHARD CRISP, Warden, Oklahoma State Penitentiary, and his successor; J. M. SUNDERLAND, Warden, Oklahoma State Reformatory, and his successor; DEPARTMENT OF CORRECTIONS; F. WARREN BENTON, Director, his successor, and the current; BOARD OF CORRECTIONS, STATE OF OKLAHOMA; FRANK E. CAREY, JR., President; LEROY KIRK; PATRICIA MONTGOMERY; GARY M. COOK; CHESTER T. CURTIN; SETH MILLINGTON; WILLIAM R. THOMPSON, as members and their successors, Defendants-Appellants

No. 89-7097

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

1991 U.S. App. LEXIS 26084

October 22, 1991, Filed

NOTICE:
THIS ORDER AND JUDGEMENT HAS NO PRECEDENTIAL VALUE AND SHALL NOT BE CITED, OR USED BY ANY COURT WITHIN THE TENTH CIRCUIT, EXCEPT FOR PURPOSES OF ESTABLISHING THE DOCTRINES OF THE LAW OF THE CASE, RES JUDICATA, OR COLLATERAL ESTOPPEL. 10TH CIR. R. 36.3.

PRIOR HISTORY:
Appeal from the United States District Court for the District Court for the Eastern District of Oklahoma; District No. 72-95-CIV.

DISPOSITION: DISMISSED

JUDGES: Logan, Moore, and Anderson, Circuit Judges.

OPINION BY: ANDERSON

OPINION: ORDER AND JUDGMENT

Park J. Anderson and his successor, Warden of the Oklahoma State Penitentiary at McAlester, Oklahoma, appeal from the denial of a motion to modify an injunction entered by the district court on September 11, 1978. Since the notice of appeal fails to satisfy the dictates of Fed. R. App. P. 3(c), and because Anderson and his successor have no standing to bring this appeal, the appeal is dismissed.

In 1978, the district court entered an order leading to the permanent closure of the East Cell House at the Oklahoma State Reformatory at Granite, Oklahoma. *Battle v. Anderson*, 457 F. Supp. 719, 739 (E.D. Okla. 1978). On May 1, 1989, the Attorney General of Oklahoma filed a Fed. R. Civ. P. 60(b)(5) motion to modify the portion of the district court order concerning habitation at Granite. The district court denied the motion. The Attorney General of Oklahoma filed a notice of appeal on November 21, 1989. On September 19, 1990, this court, sua sponte, raised the issue of whether the notice of appeal complied with the jurisdictional requirements of Fed. R. App. P. 3(c)[1] as interpreted by the Supreme Court in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). The parties were ordered to brief the *Torres* issue, and they have responded.

---

[1] Rule 3(c) reads in relevant part, "The notice of appeal shall specify the party or parties taking the appeal . . . . An appeal shall not be dismissed for informality of form or title of the notice of appeal." Fed. R. App. P. 3(c).

The issue arises because appellants identified themselves as "Park J. Anderson, et al." in the caption of the notice of appeal and coupled this with the phrase "defendants herein" in the body of the notice.[2] Park J. Anderson and his successor are wardens of the Oklahoma State Penitentiary at McAlester, Oklahoma. Neither the warden of the facility at Granite nor a higher official with authority over the Granite facility was specifically named as an appellant, although such individuals are named as defendants in the suit.

In *Torres*, the Supreme Court held that a failure to comply with the specificity requirement of Rule 3(c) presented a jurisdictional bar to appeal. 487 U.S. at 314. This court has consistently held that use of the phrase "et al." to designate more parties than the appellant named in the caption of the notice of appeal does not satisfy the command of Rule 3(c). See *Storage Technology v. U.S. Dist. Court for Dist. of Colo.*, 934 F.2d 244, 247-48 (10th Cir. 1991) (use of "et al." together with "all the Defendants of record herein" in body of appeal leaves reviewing court to determine identity of appellants without any clear point

---

[2] The notice at issue here, filed November 21, 1989, reads:

BOBBY BATTLE, ET AL., Plaintiffs, and, UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. PARK J. ANDERSON, ET AL., Defendants.

NOTICE OF APPEAL

Robert H. Henry, Attorney General of Oklahoma, appearing on behalf of the Defendants herein, respectfully appeals . . . from [the Distict] Court's Order of September 26, 1989 denying these Defendants' motion to modify previous injunctions to permit renovation of the East Cellhouse at the Oklahoma State Reformatory.

Respectfully submitted,

ROBERT H. HENRY, ATTORNEY GENERAL OF OKLAHOMA

of reference); *Pratt v. Petroleum Prod. Management, Inc. Employee Sav. Plan & Trust*, 920 F.2d 651, 654 (10th Cir. 1990) ("et al." designation in conjunction with phrase "defendants above named hereby appeal" does not satisfy Rule 3(c)); *Laidley v. McClain*, 914 F.2d 1386, 1389 (10th Cir. 1990) (use of "et al." together with "plaintiffs hereby appeal" is insufficient to confer jurisdiction over unnamed plaintiffs under Rule 3(c)).[3] These cases are dispositive of the authority Anderson and his successor cite to us on appeal. As the First Circuit stated in *Santos-Martinez v. Soto-Santiago*, 863 F.2d 174, 177 (1st Cir. 1988), "[i]t does not suffice that the actual appellants are now known and that no harm may have been done by reason of the insufficient notice of appeal."

Official capacity suits are an exception to the general rule of *Torres*. *Brown v. Palmer*, 915 F.2d 1435, 1439-40 (10th Cir. 1990). See also *Pratt v. Petroleum Prod. Management, Inc. Employee Sav. Plan & Trust*, 920 F.2d 651, 657 n.6 (10th Cir. 1990). In *Brown*, plaintiffs brought suit against Colonel James Palmer, the Base Commander of Peterson Air Force Base, and Colonel Eugene Cullinane, the commanding officer of the headquarters of the Air Force's 3rd Space Support Wing, in their official capacities. The notice of appeal listed only Colonel Palmer as

---

[3] Interpreting the language in *Torres* that a court may find that an appellant has complied with Rule 3(c) "if the litigant's action is the functional equivalent of what the rule requires," 487 U.S. at 317, this circuit has held that an appellant can timely cure any defects in the notice by filing additional documents with the court. See *Hubbert v. City of Moore, Okla.*, 923 F.2d 769 (10th Cir. 1991) (cure through timely filing of docketing statement). No such cure was effectuated here. The docketing statement was filed more than 60 days after the entry of the September 26, 1989 order appealed from here and cannot be considered timely under Fed. R. App. P. 4(a)(1).

the appellant in the caption of the appeal and used an "et al." designation to include Colonel Cullinane. We held that the United States had satisifed the jurisdictional requirement of Rule 3(c) because use of the "et al." designation in the case deprived neither plaintiffs nor the court of "fair notice of the specific individual or entity seeking to appeal." 915 F.2d at 1439 (quoting *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988)). We noted that this was because "[p]laintiffs clearly understood that an appeal by Colonel Palmer was in effect an appeal by the United States in light of the fact that they had sued Colonel Palmer and Colonel Cullinane only in their official capacities." *Brown*, 915 F.2d at 1439.

In *Brown*, however, Colonel Palmer had standing to bring the appeal. Any decision reached in the case would bind all the members of the base because of Colonel Palmer's position as base commander. Here, by contrast, any judgment relating to Park Anderson and his successor will not bind the authorities responsible for the institution located in Granite, Oklahoma, which is the subject matter of this appeal. Anderson and his successor can only be bound as to events concerning the McAlester, Oklahoma facility. The *Brown* official capacity exception to *Torres* cannot sweep into the court's jurisdiction additional appellants who could not otherwise be bound by an appeal brought in their official capacity.

When the party named in the notice of appeal is not the real party in interest to the appeal, the court lacks jurisdiction to reach the merits of the appeal. See *Concorde Resources, Inc. v. Woosley (In re Woosley)*, 855 F.2d 687 (10th Cir. 1988). Appellant Anderson and his successor lack the "personal stake in the outcome of the controversy" that is a prerequisite for standing. *Sierra Club v.*

Morton, 405 U.S. 727, 732 (1972) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

Anderson and his successor do not advance any further exceptions to *Torres* and we decline to adopt any.[4]

For the foregoing reasons, the appeal is DISMISSED.

---

[4] We note that plaintiffs in this suit have been certified as a class. The Fifth Circuit has adopted a class action exception to *Torres*. *Rendon v. AT&T Technologies*, 883 F.2d 388, 398 n.8 (5th Cir. 1989); *Morales v. Pan Am. Life Ins. Co.*, 914 F.2d 83, 84 (5th Cir. 1990). Once certified as a class, the class party only needs to name the class representative in the notice of appeal. An "et al." designation also perfects the appeal of all the remaining members of the class since the class representative binds all members of the class. By contrast, the parties opposing the class cannot merely invoke the generic class label in their notice of appeal because not every member of that group who could possibly appeal may decide to become a party to the appeal.

Supreme Court, U.S.
FILED
MAY 20 1992
OFFICE OF THE CLERK

(2)

No. 91-1363

In The

Supreme Court of the United States

October Term, 1991

GARY JOHNSON, STATE'S ATTORNEY OF KANE COUNTY; JOHN RANDALL, SHERIFF OF KANE COUNTY; ROLAND W. BURRIS, ATTORNEY GENERAL OF THE STATE OF ILLINOIS,

Petitioners,

vs.

CHI FENG SU,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court of appeals lacks jurisdiction over unnamed parties, when the phrase, "et al.," is used in the caption of a Notice of Appeal, rather than the specific names of the parties to the appeal; and where the body of said Notice of Appeal likewise fails to specifically name the parties to the appeal.

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STATUTORY PROVISION

Federal Rule of Appellate Procedure, Rule 3(c) .. *passim*

No. 91-1363

In The

Supreme Court of the United States

October Term, 1991

GARY JOHNSON, STATE'S ATTORNEY OF KANE COUNTY; JOHN RANDALL, SHERIFF OF KANE COUNTY; ROLAND W. BURRIS, ATTORNEY GENERAL OF THE STATE OF ILLINOIS,

Petitioners,

vs.

CHI FENG SU,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHI FENG SU, Respondent herein, prays that Petitioners' request for a Writ of Certiorari be denied, and that the judgment of the United States Court of Appeals for the Seventh Circuit, entered on September 20, 1991, be not disturbed.

OPINION BELOW

The order of the United States Court of Appeals for the Seventh Circuit is not reported. It is reproduced in the

Appendix to Petitioners' Petition for Writ of Certiorari (Petitioners' Br. 1a). The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is reported at 737 F. Supp. 488 (N.D. Ill. 1990).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on September 20, 1991, dismissing the appeal for lack of jurisdiction. No petition for rehearing was filed. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1). Petitioners claim to have timely filed their petition in this court pursuant to §2102(c). Respondent suggests Petitioners meant to say 2101(c).

Respondent submits that because the Seventh Circuit Court of Appeals held Petitioners' notice of appeal to the seventh circuit to have been inadequate to confer jurisdiction based on a failure to name the appealing parties, then the record must, by definition, leave this court void of any indication of who has or has not complied with the 90-day time constraint for the filing of a petition for certiorari. It is clear, however, that the 90 days would have had to begin running from the date the last order was entered which would have clearly and adversely affected the specific rights of a specific, known party. Therefore, those Petitioners not expressly named in the notice of appeal are well beyond the 90-day period imposed by §2101(c).

STATUTE INVOLVED

Federal Rule of Appellate Procedure 3(c)

Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

STATEMENT OF THE CASE

A grand jury in Kane County, Illinois, indicted Chi Feng Su, M.D., of 55 counts of delivery of controlled substances to undercover agents, in violation of Section 1401 of the Illinois Controlled Substances Act. Ill. Rev. Stat., 1971, ch. 56½, §1401. The counts were ordered chronologically, the earlier alleged deliveries having been charged in the lower counts, the later alleged deliveries, in the higher counts.

Robert Casey, the state's attorney at the time, elected to prosecute Dr. Su only on counts 41 through 55, but to elicit evidence relating to all 55 counts, as part of his effort to establish motive, intent, method of operation, and common scheme.

The case proceeded to a bench trial in the Kane County Circuit Court, before Judge John L. Nickels. At the trial, the state's attorney elicited evidence from the undercover agents, relating to all 55 counts. (Benigno,

R.301-340; Satriano, R.136-162; Jones, R.191-210; and Gore, R.231-285). The record does not disclose the state's attorney's case-in-chief ever distinguished between those counts on which Dr. Su was being prosecuted, and the counts on which he was not.

In presenting his hypothetical question to the state's experts during the trial, the prosecution included **all** the visits by each agent to Dr. Su, and **all** the prescriptions issued to them. (R.727-740; 846-858). In essence, the state presented all the evidence it had from the undercover agents on each of the deliveries of controlled substances, from the earliest, in July, 1986, to the latest, in November, 1986. The state sought opinions from its experts on all those alleged interactions between the agents and Dr. Su.

At the conclusion of the trial, on November 2, 1987, Judge Nickels acquitted Dr. Su, ruling the prosecution had failed to prove, beyond a reasonable doubt, he had delivered controlled substances outside the ordinary course of medical treatment. (R.1450-1451) There was "no issue" that the prescriptions had been written by Dr. Su, and that they were for controlled substances, the court observed. (R.1443) However, the "largest and most contested issue is whether or not the Defendant issued the prescriptions in question within the ordinary course of medical care and treatment of [the patients/agents]." (R.1443).

The court's reference to "the regular course of . . . treatment" was to Section 1312(h) of the Controlled Substances Act, which provides that prescriptions not issued in the regular course of professional treatment violate the law. Ill.Rev.Stat., 1971, ch. 56½, §1312(h). In examining

this issue, the court considered a number of factors, and concluded Dr. Su's records had been kept in the ordinary course of, and contemporaneously with, his treatment of the undercover agents. (R.1445) It observed that on each agent's initial visit, he or she had received a physical examination; and, on each successive visit, had been personally seen by the doctor, who had made and maintained notes of their visits. (R.1447) The court emphasized the doctor could have prescribed the drugs without even having met with the patients. (R.1447)

Perhaps most significantly, the court observed, the prosecution never demonstrated a clear financial motive (R.1480):

> This was the thing that I kept looking for throughout this to sort of "beef up" this theory that the state has that the doctor was guilty of wrongdoing here. And I can see no reason for the doctor doing this. . . . But in order for a doctor to lay his license on the line and to prescribe these things inappropriately, for no reason, it just simply doesn't make sense to me. And I'm not able to find any reason for the doctor having done what the state claims he did.

After the acquittal, the state's attorney announced his intent to prosecute Dr. Su on counts 1 through 40 of the indictment, and moved for substitution of judges, arguing the court was now predisposed to rule against the state, having heard **all** the evidence, in the first trial, which the prosecution intended to re-use in the second trial. (C.63) Dr. Su simultaneously filed a motion to dismiss the remaining 40 counts, based on collateral estoppel and double jeopardy.

In support of its motion to substitute judges, the prosecution argued (R.1473):

> The evidence on the remaining counts would be basically the same. . . . They would be different days and different drugs prescribed, but basically the same evidence and basically the same opinions. He [Judge Nickels] has already determined that that's insufficient.

The state's motion for substitution was denied, as was its subsequent request that the judge recuse himself. Dr. Su's motion to dismiss the first 40 counts based on double jeopardy was also denied. (C.70;82;126)

Dr. Su appealed the denial of his motion to dismiss to the Second District Illinois Appellate Court, which, on March 30, 1989, affirmed the lower court's decision. On October 5, 1989, his petition for leave to appeal the appellate court's ruling to the Illinois Supreme Court was denied.

On June 5, 1989, Dr. Su petitioned the District Court for the Northern District of Illinois for a writ of habeas corpus, which named, as respondents, the then-State's Attorney of Kane County, Robert Casey; the Sheriff of Kane County, John Randall; and then-Illinois Attorney General, Neil Hartigan. On May 10, 1990, Judge Alesia, in a 9-page Memorandum and Opinion, granted Dr. Su's petition, and issued the writ. A copy of this opinion is set forth in the Appendix to Petitioners' Petition for Writ of Certiorari. (Petitioners' Br. 5a)

On June 7, 1990, Robert Casey filed a purported Notice of Appeal of Judge Alesia's order, which did not name or identify the parties actually appealing the ruling.

A copy of this purported notice is set forth in the Appendix to Petitioners' Petition for Writ of Certiorari. (Petitioners' Br. 7a)

On September 20, 1991, following oral argument on both the procedural issue of jurisdiction, and the substantive issue of double jeopardy, the Seventh Circuit dismissed the appeal for lack of jurisdiction. A copy of this opinion is set forth in the Appendix to Petitioners' Petition for Writ of Certiorari. (Petitioners' Br. 1a) Well after the mandated had issued, Petitioners unsuccessfully attempted to recall the mandate. Their petition to this court followed.

REASONS FOR DENYING THE WRIT

RULE 3(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE REQUIRES THAT THE NOTICE OF APPEAL SPECIFY THE PARTIES TAKING THE APPEAL. THE USE OF THE PHRASE, "ET AL.," IN THE CAPTION OF THE NOTICE OF APPEAL, COUPLED WITH THE FAILURE OF THE BODY OF THE NOTICE OF APPEAL TO SPECIFICALLY NAME THE APPELLANTS, LEFT THE COURT WITHOUT JURISDICTION IN THIS MATTER.

Dr. Su was tried on 15 of 55 counts of delivery of controlled substances, in a bench trial before a circuit judge in Kane County, Illinois. The prosecution elicited evidence relating to all 55 counts, in an effort to establish motive and intent. It failed; and Dr. Su was acquitted.

The state's attorney opted to prosecute Dr. Su on the remaining counts. Dr. Su's protestations, based on the constitutional guaranty against double jeopardy, falling

on deaf ears. When his state court remedies failed him, Dr. Su turned to the federal court, which saw fit to grant his petition for writ of habeas corpus. A copy of the district court's opinion is set forth in the Appendix to Petitioners' Petition for Writ of Certiorari. (Petitioners' Br. 5a)

The respondents in the petition to the district court were the then-State's Attorney of Kane County, Robert Casey; the Sheriff of Kane County, John Randall; and then-Illinois Attorney General, Neil Hartigan. It is anybody's guess as to which of them opted to appeal the writ's issuance to the Seventh Circuit Court of Appeals.

A Notice of Appeal was filed, the caption of which indicated the Respondents to be "Robert F. Casey, et al." A copy of this purported notice is set forth in the Appendix to Petitioners' Petition for Writ of Certiorari. (Petitioners' Br. 7a) The body of the Notice of Appeal merely said "that respondents, by their attorney, Neil F. Hartigan, Attorney General of the State of Illinois, hereby appeals [sic]. . . . " Casey is the only party named in the caption; no parties are named in the body. (Hartigan was named in the body only in his capacity as attorney of record for the respondents.) Furthermore, a plural noun (respondents) is combined with a singular verb (appeals) to insure the confusion would permeate the record on appeal.

It is no wonder the Seventh Circuit dismissed the appeal for want of jurisdiction. A copy of this opinion is set forth in the Appendix to Petitioners' Petition for Writ of Certiorari. (Petitioners' Br. 1a)

In *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S.Ct. 2405 (1988), the caption of a Notice of Appeal used

the phrase, "et al.," rather than naming the appellants. The particular appellant, who had not been specifically named in the caption or the body of the Notice of Appeal, brought a petition for certiorari to this court. This court held that the use of "et al.," failed to satisfy the specificity requirement of Rule 3(c), which dictates that the Notice of Appeal specify the parties taking the appeal. F.R.A.P. Rule 3(c).

The errant notice had deprived the court of appeals of jurisdiction, this court held, noting "the failure to name a party in a notice of appeal is more than excusable 'informality;' it constitutes a failure of that party to appeal." 487 U.S. at 314, 108 S.Ct. at 2407.

The Notice of Appeal filed by Petitioners is devoid of any reference specifically identifying the party or parties actually pursuing the appeal. Reference to Petitioners' previously filed pleadings would not be of much help in clarifying just whom is meant by "et al.," because the Motion for Extension of Time, Notice of Motion, Memorandum of Law in Opposition to Petition for Writ of Habeas Corpus, Notice of Filing, and the Corrected Memorandum of Law in Opposition to Petition for Writ of Habeas Corpus, all name **only** Robert F. Casey, and do not even say, "et al."

Now, well after the mandate was issued by the seventh circuit, Petitioners applied to this court for certiorari, opting for the infinitely more formal, dignified and wiser approach of expressly naming the parties.

On the first page of their brief, Petitioners slightly misstate the "Question Presented." Petitioners apparently believe the "question" to be "whether a habeas petitioner

and the court below received **fair notice** of the entity seeking to appeal . . . . " (Petitioners' Br. i [Emphasis Added]) But, the question is not whether the court or Dr. Su could guess who was appealing. The question is whether jurisdiction was preserved for appellate review. According to the dictates of federal rules, and this court, it simply was not.

Petitioner argues it filed a "functional equivalent of a notice of appeal," and that all were named as appellants by implication. (Petitioners' Br. 8) Never do Petitioners explain, however, why they believe a "functional equivalent" to something they were supposed to have done is sufficient, when the most critical issue of all is involved: a matter of jurisdiction. When the caption and the body of the Notice of Appeal are read together, it is still ambiguous as to the number and identities of the parties taking the appeal. It is the functional equivalent of the waiving of a right, by licensed, experienced attorneys, and nothing more.

Petitioners argue they have been denied their right to appeal based on "mere technicalities," and ask this court to waive the jurisdictional requirements of Rule 3(c), and exercise jurisdiction over previously unnamed parties, even though the time for filing a notice of appeal has passed. (Petitioners' Br. 11) Petitioners ask this court to treat the jurisdictional requirements of Rule 3(c) as "mere technicalities." But, the jurisdictional requirements of Rule 3(c) are not "mere technicalities." In *Torres*, this court specifically states, 487 U.S. at 315, 108 S.Ct. at 2408:

> Permitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice

> of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal. But although a court may construe the rules liberally in determining whether they have been complied with, it may not waive the jurisdictional requirements of Rules 3 and 4, even for "good cause shown" under Rule 2, if it finds that they have not been met.

If Petitioners are truly concerned about correcting mere technicalities, maybe they should begin by addressing the anomaly as to how those parties **not** named as appellants in the seventh circuit (all but Casey) can now find themselves in the supreme court, and how their petition can be entertained. Rule 2101(c) of the Federal Rules of Appellate Procedure requires that a petition for certiorari be filed within 90 days of the ruling of which review is sought. The writ of habeas corpus was granted on May 10, 1990. Rule 3(c) and this court's holding in *Torres* require that the notice of appeal specifically name the parties taking the appeal. Petitioners were not specifically named on the Notice of Appeal. Therefore, the only ruling which Petitioners can appeal to this court is issuance of the writ of habeas corpus, not the seventh circuit's dismissal for lack of jurisdiction. Because Petitioners did not appeal the writ of habeas corpus within the allocated time period, they are technically too late to have **any** court review this matter.

Petitioners argue that both the court and Dr. Su understood who was seeking the appeal. (Petitioners' Br. 9) But this argument misses the point. Actual confusion is

not a prerequisite to dismissal for failure to strictly comply with the naming requirement of Rule 3(c). *Pride v. Venango River Corp.*, 916 F.2d 1250, 1251 (7th Cir. 1990).

Other courts have held, as did this court in *Torres*, that Rule 3(c) requires parties to be specifically named, regardless of whether actual confusion results as to whom the appellants are. In *Laidley v. McClain*, 914 F.2d 1386 (10th Cir. 1990), the tenth circuit held there was no appellate jurisdiction over appeals of plaintiffs not specifically named as parties in the notice of appeal. Dismissal of the appeals of unnamed plaintiffs was necessary, the court held, even though the caption included the "et al.," designation, the body of the notice stated the "plaintiffs" hereby appeal, and it was asserted that both defendants and the court were aware that all plaintiffs were appealing.

In *Santos-Martinez v. Soto-Santiago*, 863 F.2d 174 (1st Cir. 1988), the first circuit held that appellants listed as "[one non-appealing plaintiff's name] et al.," failed to meet Rule 3(c)'s requirement that the parties be specifically named.

In *Shatah v. Shearson/American Express, Inc.*, 873 F.2d 550 (2nd Cir. 1989), the Second Circuit held the use of the phrase, "et al.," does not satisfy the jurisdictional requirement of Rule 3(c) and that notice of appeal must specify the parties taking the appeal. And, in *Allen Archery, Inc. v. Precision Shooting Equipment, Inc.*, 857 F.2d 1176 (7th Cir. 1988), the Seventh Circuit held Rule 3(c) requires punctilious, literal and exact compliance.

In light of this court's holding in *Torres*, and the plentiful case law in the courts of appeal, it is clear the

jurisdictional requirement of Rule 3(c) can only be met when the appellants are specifically named in the notice of appeal. Any lowering of this standard, by allowing "et al.," and implications as to the parties instead of requiring specific names, would only lead to confusion and guessing as to who are the appellants. But more than that: the use of the phrase, "et al.," fails to comply with jurisdictional requirements, which are the very backbone of the legal process.

CONCLUSION

For all the reasons discussed herein, a writ of certiorari should be denied and the decision of the United States Court of Appeals for the Seventh Circuit should be allowed to stand.

Respectfully submitted,

CHI FENG SU, M.D.,
Respondent
by, AUGUSTINE, KERN AND LEVENS,
his attorneys

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